OBA Response to the Law Commission of Ontario: Class Actions Objectives, Experiences and Reforms

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

Introduction

The Ontario Bar Association ("**OBA**") appreciates the opportunity to comment on issues raised in the Law Commission of Ontario ("**LCO**") consultation paper on "Class Actions Objectives, Experiences and Reforms" (the "**Consultation Paper**").[1]

The OBA

Established in 1907, the OBA is Ontario's largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics that affect the administration of justice in Ontario, including submissions to the provincial government, Law Society of Ontario and the Law Commission of Ontario – both in the interest of the profession and in the interest of the public.

This response has been developed by the OBA's Class Actions section, whose members regularly represent the broadest possible range of clients in class action proceedings, including both plaintiffs and defendants. For ease of reference, this submission has been organized around the thirteen questions set out the LCO's Consultation Paper (set out in full in **Appendix A**), and will address each in turn.

1. Delay

Question 1: How can delay in class actions be reduced?

There is general agreement on both sides of the class action bar that undue delay is an issue in many (but not all) class proceedings in Ontario. Some delays, as compared to the pace of ordinary actions, are inevitable given the factual and legal complexity of many class actions. However, some causes of unnecessary delay could be addressed by amendments to the *Class Proceedings Act, 1992*.[2]

Subsection 2(3) provides that a motion for an order certifying the proceeding as a class proceeding shall be made within 90 days after the last statement of defence is delivered, or the date on which the time prescribed by the rules for delivery of the last

[1] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms. Online: https://www.lco-cdo.org/en/our-current-projects/class-actions/
[2] S.O. 1992, c. 6 (the "**CPA**").

statement of defence, notice of intent or notice of appearance expires without the same being delivered. Thereafter, leave of the court is required to make such a motion.

Among other things, the current wording of subsection 2(3) ignores the common practice whereby a statement of defence is not delivered in most cases until after the certification motion has been determined. To this point, although there is jurisprudence that addresses the advantages and disadvantages of delivering a statement of defence prior to the certification hearing, the OBA does not take a view on whether one or the other approaches is preferred.

More importantly, in practice, this rule is honoured only in the breach and is therefore almost universally ignored by both counsel and the courts. It does nothing to prevent unnecessary litigation delay. It should be abolished and replaced by more realistic guidelines for the delivery of a certification record.

There also remains an issue with a small number of class actions that are commenced but are never seriously pursued. Class proceedings are expressly exempted from Rule 48.14 of the *Rules of Civil Procedure*,[3] which provides for the administrative dismissal for delay of ordinary actions that are not set down for trial within a reasonable period of time.

For these reasons, the CPA should be amended to provide a mechanism for the administrative dismissal of class proceedings that are in fact dormant, which should be tailored to the realities of this type of litigation and could provide for notice to putative class members where appropriate.

We recommend that the CPA be amended to provide for the automatic dismissal of a class proceeding where: a) the plaintiff has not served a certification record within one year of the commencement of the action; or b) the certification motion has not been determined within five years of the commencement of the action; except, in both cases, where the parties consent or with leave of the court. Although in some cases notice to putative class members of the dismissal will not serve any useful purpose (for instance, where the case has never been seriously pursued), the court should have the authority to order notice as appropriate.

In general, the OBA also sees active case management as an important mechanism to prevent cases from stagnating. Case management judges should be appointed and

[3] R.R.O. 1990, Reg. 194.

assigned promptly. As an alternative to or in conjunction with the above recommendations, subsection 2(3) of the CPA might be amended to require that within the 90-day timeline, the plaintiff must seek appointment of a case management judge and/or that an initial case management conference be scheduled. This would more effectively address issues of delay and proper case scheduling.

2. Class Compensation

Question 2: Given that class actions must provide access to compensation to class members, how should distribution processes be improved?

First, it is the opinion of the OBA that this question has embedded within it a fundamental misconception. Class actions do not have to provide access to compensation for class members.

We suggest that a more appropriate question is "Given that one of the goals of class actions is to compensate injured class members, how can the distribution processes for class members be improved?"

One of the fundamental goals of the CPA is, and should continue to be, behaviour modification. In some instances this goal will be a sufficient reason for a class action to be commenced, regardless of whether or not compensation is ultimately disbursed directly to class members.

In Ontario, injunctive and declaratory relief are often included as remedies sought in a class proceeding. One early example was the *Markson v MBNA* case.[4] One of the reasons that the class action was allowed to proceed was to achieve the goal of stopping the defendant from employing a practice that allegedly resulted in it charging criminal interest. The declaratory relief sought affected the entire class.

Similarly, in the *Competition Act* context,[5] price fixing may result in damages to indirect purchasers that are too small to compensate directly; but the courts have confirmed that "too small individual loss" is not a reason for the action not to be brought to stop the anti-competitive behaviour and to deter future anticompetitive conduct.

[4] *Markson v MBNA Canada Bank,* 2007 ONCA 334.
[5] RSC 1985, c C-34.

Indeed, in the US system, the rules provide specifically for a form of "injunction" class action where no class member can opt out, and the primary goal is behaviour modification. Thought should be given to amendments to the CPA that would facilitate and finance such "private attorney general" forms of proceedings.

It is essential in conducting this review that the LCO not focus only on the need to provide compensation to individual class members, but to look at the three goals of the Act holistically, appreciating that all three objectives serve important public purposes, none of which should be prioritized over the others.

What are the best practices for distributing monetary awards to members?
If class members entitled to a monetary award can be identified, then the best practice for distribution of monetary awards is to facilitate electronic bank transfers. They are more cost effective, less susceptible to fraud, and provide the class member with immediate access to the funds when disbursed. They also provide certainty of receipt for the purposes of reporting and record-keeping. Consideration should be given to whether cheques are ever an appropriate way to distribute monetary awards to members. Another option for such distributions are loaded "cash cards." Unlike cheques they are inexpensive to create, and do no go "stale".

With respect to claims forms, establishing a simplified, on-line form is cost-effective and widely accessible, and can include features to assist disabled Ontarians. However, since internet filing is not available to all Ontarians, a paper form must continue to be an option when claims are necessary.

Best practices must always promote simplified language and terms, and consideration should be given to Ontarians with disabilities, and how to make the claim process accessible to them.

Best practices should also include bilingual translations, and the possibility of the need for translations into other languages in appropriate circumstances.

We would, however, encourage parties to be creative in considering whether a claim form is necessary in instances where a settlement is achieved and the class is known. If the class is known, consideration should be given to distributing the payments without class members being put to any onus of completing any application or claim form.

How can transaction or agency costs be reduced in distributions?
Class counsel need to take responsibility to ensure that the distributions are cost-effective, and consider alternative means of distribution. Multiple quotes from claims

administrators should be sought to ensure a competitive bid process. Claims administrators should be held to their quotes, and any "additional costs" heavily scrutinized, rather than simply passed along at the expense of the class.

To the extent that a defendant has records, or can facilitate the acceleration of the distribution process, they should be encouraged to do so.

Is transparency important in class actions? If so, how can reporting and monitoring be improved?

Transparency is essential both to ensure that class members and the court are fully informed, but also to ensure accountability on the part of both the plaintiffs and the defendant with respect to the results achieved in the litigation.

Reporting on settlement or judgment distribution should be mandatory, including not only reporting to the parties and the court, but also in a form that is readily accessible to the class, either through the claims administrator's website or from class counsel, or both. Reporting obligations should be built into all administration retainers and be required as part of any settlement approval order or judgment.

Mandatory reporting to the proposed new National Class Action Database ("**NCAD**") would also be helpful, and add only a nominal administrative burden.

Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?

The OBA believes public reports should be filed for the reasons set out above. The report should:

- Quantify the total funds disbursed by the defendant;
- Identify payments made to anyone other than the class (e.g., class counsel, third-party investors, representative plaintiffs and claims administrators);
- Describe the methodology by which the distribution to the class was determined;
- Quantify the total gross payments to class members, and the number of class members who received compensation;
- In the event that there is more than one category of compensation provided for in the distribution, state the total number of class members who received a payment under each compensation category and the quantum of distribution to the members of that category; and,

- In the event there are settlement funds left over after distribution to the class members, reference should be made as to the disposition of those funds.

Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?
Reporting on settlement or judgment distribution should be mandatory, both to the court and to the parties. Further requirements should not be legislated and are better addressed through the adoption of "best practices" by members of the bar.

3. Costs Rule

Question 3: What changes, if any, should be made to the costs rule in the CPA?

Should Ontario retain the two-way costs rule?
It is the position of the OBA Class Actions section that Ontario's two-way costs regime should be retained in respect of class actions. However, it is our view that more certainty and predictability in costs awards is needed, in that the quantum of costs orders in class actions has been somewhat unpredictable in recent years, ranging from tens of thousands to millions of dollars. It is our view that more predictability will be useful and will go a long way toward ensuring that meritorious, yet risky class actions do not suffer a chilling effect, while unmeritorious class actions are discouraged.

Is the cost of indemnities against adverse costs a concern?
To the extent that the issue of costs indemnities relates to the previous and subsequent sub-issues in this question, the OBA does not believe that indemnities for costs provide an adequate response to the problems raised by the unpredictability of Ontario costs orders discussed elsewhere in this submission for two reasons.

First, as the jurisprudence has stated, costs indemnities by counsel inherently impose onerous financial burdens on counsel and risk compromising their independence, which is a valued part of our legal tradition.[6] Accordingly, to the extent that costs indemnities are provided by counsel, they are a concern. The greater issue, however, is how to resolve the identified concerns without putting increased financial burdens on the class, and ensuring that the class still receives reasonable access to justice through reasonably incentivized class counsel.

[6] *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785 at para 29.

Second, in any event, costs indemnities by counsel are becoming impracticable in the face of recent "astronomical costs awards".[7] If the current trend in adverse costs awards continues unabated, it will necessarily lead to a greater need for third party litigation funders, as counsel will be unwilling to shoulder the risks of a cost award that could potentially put the firm out of business.

Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?

Giving the responsibility of deciding on a different percentage in every case, similar to a private third party funder, would be problematic for the Class Proceedings Fund ("**CPF**") as a statutory body. It would raise issues of fairness amongst the various class actions and make the CPF's decision-making process vulnerable to complaints of unreasonableness and potentially the subject of judicial reviews.

As a result, rather than granting the CPF flexibility to alter its levy, we believe it would be desirable to amend the governing regulation to reduce the 10% levy, which is commonly believed to be excessive in light of the risk it typically assumes, and the levy should be subject to recovery caps.

This levy is higher than most of the third-party funding arrangements that have been approved by Ontario courts in the past few years. The approved arrangements have typically been for smaller percentages, and often are subject to caps – although the risks typically assumed are the same for CPF-approved and third-party-approved cases, and the cases are subject to the same rigorous scrutiny. Accordingly, the CPF could also operate viably at a lower percentage of recovery, potentially subject to caps. In so doing, CPF-funded cases will save class members a larger portion of judgments or settlements while at the same time giving the representative plaintiff and class counsel costs protection.

Is third party funding a positive development in class action practice? Should it be more tightly regulated?

Third party funding is a positive development in class action practice. As a consequence of the rigidity of the CPF process and the unavailability of CPF funding in all cases, third party funders have to some extent filled a vacuum. Without such funding, some cases may never be brought. The Ontario courts have recognized this contribution to access to justice. Additionally, the courts have made it a precondition to approval that the court

[7] *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974 at para 33.

be satisfied that the funding agreement is necessary in order to secure the plaintiff and the class members' access to justice.[8]

Should the source and extent of funding be disclosed to courts?
Ontario law as it stands presently requires that the source and extent of funding be disclosed to the court as soon as possible and that the funding arrangement be subject to the court's scrutiny and approval. The courts have taken this task seriously and they subject third party funding arrangements to rigorous scrutiny.[9]

We see no issue with the current system, which improves transparency and protects the various stakeholders, including both plaintiffs and the defendants.

4. Settlement and Fee Approval

Question 4: Is the current process for settlement and fee approval appropriate?

Is the legal test for settlement approval sufficient?
Yes. The legal test for settlement approval is a product of common law. To approve a settlement of a class proceeding, the court must find that in all of the circumstances the settlement is fair, reasonable and in the best interest of those affected by it as a whole, and that it falls within a 'zone of reasonableness'. In determining whether a proposed settlement is fair, reasonable, in the best interest of the class and falls within the zone of reasonableness, there is a non-exhaustive list of factors that the court may consider:

1) the likelihood of recovery or likelihood of success;
2) the amount and nature of discovery, evidence or investigation;
3) the proposed settlement terms and conditions;
4) the recommendations and experience of counsel;
5) the future expenses and likely duration of litigation;
6) recommendations of neutral parties, if any;
7) the number of objectors and nature of objections;
8) the presence of good faith, arm's-length bargaining and absence of collusion;

[8] *Bayens* at para 41. *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at para 63 [*Houle*].

[9] *Houle* at paras 56-70.

9) the information conveying to the court the dynamics of, and the positions taken by, the parties during negotiations; and
10) the nature of communications by counsel and the representative plaintiff with class members during the litigation.

Judges are encouraged to consider all of the above factors that are relevant to the circumstances of each case.

While we believe the legal test is appropriate, it would be beneficial for mechanisms to be put in place to provide additional transparency, clarity and certainty with respect to reasons for settlement approval decisions.

In some cases, the absence of detailed reasons for judgment following a settlement approval motion makes it difficult to know whether, and to what extent, the test has been considered and applied to the specific settlement in issue.

While we do not think it is necessary to amend the CPA to include the common law settlement approval test, it is our view that the reasons concerning the various factors and how those factors contributed to the decision to approve or reject a settlement must be clearly outlined for the benefit of the parties, and the public.

Is there a role for an *amicus curae* at settlement and/or fee approval?
Yes, there is a role for independent *amicus* in the right cases. In our view, there is no need for an amendment to the CPA to require *amicus*. In some cases, *amicus* may provide a useful service to the court (e.g., cases in which carriage disputes are solved by the putative class counsel entering into fee-sharing agreements). The process by which *amicus* is appointed will be key to its utility. That process should be well-considered, and define a clear role for *amicus* in relation to the case before the court that does not risk engaging the concerns described further below.

There has long been some concern expressed amongst members of the judiciary that because the plaintiffs and the defendants come to court with a unified position at the settlement approval hearing, the usual checks and balances that exist in adversarial court proceedings do not exist. This is said to put the court in the unenviable position of having to ensure that the settlement properly meets the criteria for approval on its own initiative, given that class counsel and defence counsel are both advocating for the approval of the settlement, asserting that it is fair, reasonable and in the best interests of the class.

There may be a concern that counsel may have their own reasons for wanting the settlement to be approved, and that the presence of an independent third party would ensure that the interests of the class are properly represented. However, it is our view that giving this job to *amicus* would merely transfer the judge's role to *amicus*, at significant additional cost to the parties and without addressing the perceived problem.

As discussed above, we are of the view that clearly outlined reasons for settlement approval or disproval, may improve any perceived shortcomings in the current settlement approval process.

Rather than encouraging judges to appoint *amicus*, we recommend it be made mandatory for the parties to provide the judge with sufficient information to make an adequate determination as to whether the settlement falls within a zone of reasonableness. The Commission should consider whether or not the CPA should be amended to require the parties to file independent affidavit evidence in respect of the settlement approval criteria. While this may require additional judicial time and resources to the settlement approval motion, it is our view that this is a preferable alternative to appointing *amicus* to effectively assume a judicial position.

5. Certification

Question 5: Is the current approach to certification under s. 5 of the CPA appropriate?

Certification is one of the key issues that the members of the OBA involved in class actions practice address and debate on an ongoing basis.

We are not able to provide a consensus view on this subject at this time.

6. Behaviour Modification

Question 6: Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?

While we are not in a position to determine whether class actions are meeting the objective of behavior modification in Canada, we are aware of research in other jurisdictions that have examined the same or similar questions.

One such empirical study was recently published by author Brian Fitzpatrick.[10] The study considers class actions in the United States, however, it demonstrates the possibility of empirical study of the deterrent effect of class actions on corporate misconduct and, presumably, the methodology employed in the study could be replicated in Ontario.

In our view, such a study would be a welcome addition to the academic scholarship on class actions in Canada. As described further below, the OBA strongly supports the collection of empirical data as to the efficacy of class actions in meeting the policy goals they are intended to advance.

7. Experiences with Class Actions

Question 7: Please describe class members' and representative plaintiffs' experience of class actions.

How can class action processes be improved for class members and representative plaintiffs?

We believe that greater transparency and access to timely information regarding the progress of a class action are crucial to improving a class members' experience with participation in a class proceeding. At present, some class counsel post pleadings and other key documents on their websites, while others do not. Similarly, some class counsel keep class members updated through periodic posts on their websites, while others fail to do so in a timely manner. It would be desirable to standardize the minimum level of updates provided to class members.

To this end, we note the existence of the NCAD: a pilot project initiated by the Civil Litigation Section of the Canadian Bar Association, following a recommendation by a Uniform Law Conference of Canada's Working Group on Multi-jurisdictional Class Actions. The NCAD encourages, but does not mandate, counsel to submit information regarding all new class actions they initiate. The information includes the subject matter of the class action, whether it has been certified, the description of the proposed class and name of class counsel.

[10] Fitzpatrick, Brian T., Do Class Actions Deter Wrongdoing? (September 12, 2017). Vanderbilt Law Research Paper No. 17-40. Available at SSRN: https://ssrn.com/abstract=3020282 or http://dx.doi.org/10.2139/ssrn.3020282

We recommend several mandatory requirements to promote class members' access to a minimum level of timely disclosure and other information regarding the progress of their class action. We propose that:

- The provision of information regarding new and ongoing class actions to NCAD be made mandatory;
- The information that is currently submitted to NCAD on a voluntary basis be required to be posted on both NCAD and class counsel's website;
- Pleadings be required to be posted on class counsel's website; and that
- Information on class counsel's website be required to be kept reasonably up to date.

Are there certain kinds of disputes or legal problems that class actions are not addressing?
We believe that class actions are currently not addressing cases at the lower end of the damages scale. Anecdotally, we are aware of cases that are not taken on by class counsel because of the concern that they cannot be prosecuted in an economically responsible manner.

How can technology be used to keep class members better informed?
We recommend that the information described above (i.e., a minimum level of disclosure to class members) be provided on class counsel's website, on an ongoing basis.

Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?
We believe that the rights of objecting class members are adequately protected at present. No further statutory amendments are necessary.

8. Managing Multi-Jurisdictional Class Actions

Question 8: In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?

The CBA Judicial Protocol for Multijurisdictional Class Actions was deeply considered and debated by a broad cross-section of the judiciary and plaintiff and defence bar, and approved by the CBA Council.

If the question is whether or not the 2018 CBA Protocol is sufficient to address multi-jurisdictional class actions, the answer is certainly "no".

If, however, the question is whether the CBA Protocol is the most efficient solution to which the plaintiff and defence bar and judges can agree, absent statutory intervention, then the answer is certainly "yes".

We note that other provinces are now taking steps to amend their class proceedings legislation to take account of these issues, including Alberta, Saskatchewan and more recently, British Columbia. We endorse an amendment to the CPA consistent with the *Uniform Class Proceedings Amendment Act* of the Uniform Law Conference of Canada, as already adopted in those jurisdictions.

9. Carriage

Question 9: How should Ontario courts address the issue of carriage in class actions?

Should a modified "first to file" rule be considered in Ontario?
No. The OBA is of the view that a "first to file" rule, whether modified or not, would constitute bad policy for the following reasons:

- A "first to file" rule would encourage a "race to the courthouse" to issue a claim, even if based on insufficient information. It would promote and reward bad judgment. Both class members and defendants benefit from careful lawyering and decisions made with good legal judgment and organization.
- A "first to file" rule would give precedence to one lawyer over another, not on the basis of the best interests of the class, but on the basis of the arbitrary distinction of one case having been filed a moment or more before the other. We believe that a "first to file" rule would harm class members and the institution of class actions more than the issues presented by carriage disputes. If carriage issues are dealt with expeditiously, as is submitted below, their harm to the class may be minimal or non-existent compared to the prospects of class actions being assigned to counsel on the basis of an arbitrary, or even inverse differentiation as opposed to the interests of the class.
- To the extent that the temporal order in which two Ontario class actions on the same subject matter have been commenced may become relevant, Ontario law already takes that factor into account in deciding carriage.

- A "first to file" rule is inconsistent with over seventeen years of Ontario case law starting with *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*,[11] and the authority of the Court of Appeal in *Mancinelli v Barrick Gold Corp*.[12] The Ontario court has already determined that a "first to file" rule is not good policy, for similar reasons to those articulated above.[13]

Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?
Yes. While carriage motions are not the most desirable option for assigning representation to class members, they are a reality of Ontario class actions practice emanating from the sound policy choice of giving precedence to the best interests of the class over the strict temporal order in which actions are filed.

The main issue to be resolved in this respect is the way in which the CPA can reduce the amount of delay and distraction that a carriage fight can create. The OBA makes two proposals in that respect:

- The issue of carriage should be dealt with quickly, and preferably with a statutory deadline. The CPA should state that where counsel becomes aware of the existence of more than one class action concerning the same cause of action within the province, he or she must forthwith inform the case management judge. If putative class counsel cannot agree amongst themselves on a collaborative arrangement, they must inform the case management judge of that impasse, and a date will be set for a carriage motion to be heard within 60 days.
- The CPA should expressly state that there shall be no right of appeal from a carriage decision.

10. Appeals

Question 10: What is the appropriate process for appealing class action certification decisions?

[11] [2000] OJ No 4594 (Sup Ct).
[12] 2016 ONCA 571.
[13] *Quenneville v Audi AG*, 2018 ONSC 1530 at paras 88-89.

Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
No. Appeals from certification decisions, whether the certification was granted or rejected, should be made to the Court of Appeal, as described below.

Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?
All appeals from certification decisions should proceed directly to the Court of Appeal. Leave should not be required.

A very substantial percentage of certification motions that are appealed to the Divisional Court are then further appealed to the Court of Appeal. At the same time, a number of certification decisions also involve cross-motions for dispositive findings that result in an appeal as of right to the Court of Appeal.

This is, perhaps, unsurprising given the financial stakes of most class proceedings both to defendants and to those financially responsible for the legal costs of the plaintiff class, be they class counsel or a third-party funder. Where certification is opposed, the anecdotal and jurisprudential experience appears to be that the parties will litigate the matter until their appeals are exhausted or leave is refused.

The LCO can examine this phenomenon in much more considerable depth, but the OBA's preliminary sampling of appeals of certification decisions suggested that given the expense and delay involved in navigating two levels of appeal, the Divisional Court is at best a moderate and occasional filter between certification decisions and the Court of Appeal.

Given that the goals of class proceedings are intended to, among other things, improve access to justice and promote judicial economy,[14] it appears to be neither the most effective use of judicial resources, nor the most expedient, cost-effective approach for the parties to bind three judges of the Superior Court to hear these extensive appeals if it is at least as likely as not to be appealed further in any event; or, if as is often the case, dispositive cross-motions are heard alongside certification, their jurisdiction may be ousted in any event.

The most effective filter for these appeals in fact appears to be the leave requirement, which is a caseload-reduction tool available to the Court of Appeal as well; but by their

[14] *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534.

very nature certification appeals are unlikely to concern matters of general importance transcending the interests of the parties. That being said, the interests of the parties in certification motions are often extraordinary and there is rarely any dispute that an adverse certification decision may be equally or even more consequential to the parties than an adverse final decision on the merits of a standard civil case.

The OBA therefore recommends that, subject to the input, resources and capacity of the Court of Appeal, to which it defers, the CPA be amended to permit appeals of certification decisions directly to the Court of Appeal as of right.

11. Best Practices

What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

The OBA is of the view that the most important tool to ensuring that class actions proceed expediently through discoveries and to trial and judgment is judicial case management.

While only a minority of class proceedings proceed to a common issues trial, such trials are generally long, and both factually and legally complex. For this reason, the OBA also believes that the earlier appointment and involvement of trial judges would lead to the more efficient management of common issues trials for two reasons:

1) Early involvement of the trial judge will encourage the parties to turn their minds to trial management issues earlier in the process and to ensure that the parties and the trial judge are aligned on those issues; and that,
2) Early involvement will facilitate the timely hearing of any pre-trial motions by the judge that will actually be presiding at trial.

The CPA should also require that written trial management requirements be agreed upon by the parties and approved by the trial judge within a reasonable amount of time of the case being set down for trial. Of course, if the parties are unable to agree, the early intervention of the trial judge would also be of assistance in settling any such disputes.

12. Updates to the CPA

Question 12: In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

In addition to the proposed changes to the CPA addressed by the OBA in response to the specific Consultation Questions, there remain a number of existing provisions of the CPA that the OBA would propose be considered for amendment, repeal or for further legislative consideration to bring the CPA in line with existing jurisprudence and practice. A non-exhaustive list of considerations (in no particular order of significance) follows.

- Section 6 of the CPA has had conflicting jurisprudence in respect of its interpretation (see, for example, *Abdool v. Anahein Management Ltd.*[15] versus *Anderson v. Wilson)*.[16] The provision ought to be amended to clarify whether the grounds enumerated for which the court shall not refuse to certify a class proceeding are to be considered as separate bases for consideration, or whether these factors can be accumulated in the exercise of a court's discretion in coming to a certification decision. The OBA suggests that this provision be amended such that the phrase "any one of the following grounds" be replaced with the phrase "any one or more of the following grounds".

- The contents of a certification order are dictated by section 8 of the CPA. One of those criteria is the description of the class. The description of a class will necessarily include the temporal elements of the class period. The jurisprudence has been less than clear in interpreting the temporal aspects of a defined class, most particularly as to when the "end date" of the class definition may be. The CPA ought to be amended to both include specific reference to the class period as a requisite element of the certification order and to make it clear that the temporal elements of the class period be expressly defined.

- Section 28 of the CPA provides for the suspension of applicable limitation periods in favour of class members upon commencement of the class proceeding. It does not, however, contemplate certain claims that may be

[15] (1995), 21 OR (3d) 453 at p 473
[16] (1998), 37 OR (3d) 235 at p 253.

ancillary to or derivative of the claims raised in the class proceeding. In addition, such claims may be unknown, inchoate or otherwise not capable of being asserted in a timely way and ought to be capable of being similarly suspended based upon concerns for the fair and just administration of justice. Part of the problem this issue addresses are amendments to the *Limitations Act, 2002*[17] that could not have been contemplated at the time the CPA was enacted. The OBA therefore believes that amendments to Section 28 ought to be considered to address this issue.

- What has become known as the *Ragoonanan* principle, whereby it is required that there be a representative plaintiff with a viable claim against each named defendant, (which was further confirmed in *Hughes v. Sunbeam* by the Court of Appeal)[18] is not the law in other jurisdictions such as British Columbia and Saskatchewan. The OBA suggests that consideration be given to eliminating any uncertainty by codifying that principle in the CPA such that it becomes an express requirement.

- Similarly, other provincial jurisdictions (e.g., Saskatchewan) provide that no stay of a proceeding may be heard until the certification hearing. Particularly in the case of multijurisdictional class proceedings, this can lead to unnecessary duplication of effort and expense. The OBA suggests that consideration be given to codify in the CPA the principle that a stay of proceedings, in an appropriate case, is not precluded from being brought in advance of a certification hearing.

- A practice has developed that frequently sees limitations arguments deferred to be determined on "a full factual record". This may mean that limitations arguments remain unresolved not only at the certification stage but, frequently, at the common issues trial stage as well. This may be inconsistent with the new approach to summary judgment and to the general efficiency by which the class actions regime (otherwise meant to be procedural in nature) ought to be considered. The OBA suggests that consideration be given to amending the CPA to provide that courts are to consider, where appropriate, issues of limitations where they (i) may be dispositive of the action or (ii) may significantly

[17] S.O. 2002, c. 24, Schedule B.
[18] *Hughes v Sunbeam Corporation (Canada) Limited et al.* (2002), 61 OR (3d) 433.

reduce the issues in dispute.

- The case law under Section 24 of the CPA has presented challenges for both plaintiffs and defendants. Most particularly, the jurisprudence has developed the concept of "potential liability" in addressing the applicability of aggregate damages in any particular case. This concept has been the frequent subject of dispute and debate. Without making a specific recommendation on any amendment to Section 24, the OBA suggests that careful consideration be given to amendments to this section that would (i) align with the goals and objectives of the legislation; and (ii) bring greater clarity as to when the aggregate damages provisions are to be applicable.

Recent changes to the *Rules of Civil Procedure* have provided for an administrative dismissal of actions by the registrar for delay where the action has not been set down for trial or otherwise terminated by the fifth anniversary of the commencement of the action. By subsequent amendment, this rule change was not applicable to class proceedings. The OBA would suggest that consideration be given to an amendment to the CPA which would oblige the parties to attend a mandatory case management conference after the five year anniversary of the commencement of the action if a case management judge has not otherwise exempted the parties from such a requirement. Time limits for the hearing of the case management conference and consequences for not holding such a conference may be provided for as well.

13. Data and Reporting

Question 13: Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?

What information should be collected?

The LCO should consider a recommendation that the use of the Class Action Database be incorporated into the CPA as a statutory requirement or, perhaps preferably, as a regulation thereto. That requirement should mandate that plaintiff counsel report, and the Database display:

- Title of proceeding;
- Date of issuance of claim;
- Jurisdiction of commencement (i.e., specific forum);

- Classification of subject-matter, as in a court information form (e.g., product liability, privacy, securities, environmental tort, etc.); and
- Counsel of record.

We note that the Quebec class proceedings legislation already requires this kind of disclosure. The database should be searchable and sortable by keyword and by each of the foregoing fields, in order to facilitate searching and discourage unnecessary duplication of proceedings or inadequacies of notice.

Those entries in the database should be updated by court staff or other responsible parties after the disposition of a certification hearing, reporting the following:

- Certification granted or refused (consent or opposed);
- Causes of action certified (if specified);
- Class size and/or definition, to the extent applicable;
- Common issues certified; and
- Representative plaintiff(s).

Those entries in the database should also be updated in coordination with claims administration upon settlement or after the trial of the common issues. The OBA Class Action section is unanimous that greater visibility into the outcomes of claims administration would be welcomed by all participants.

A requirement that a claims administrator file a final report, similar to the report of a receiver or trustee, would contribute to transparency and social science analysis, as well as advancing the interests of both class and defence counsel by providing them with empirical data to contribute to out-of-court settlements and litigation strategy.

The LCO may also wish to consider what other aspects of receivership or trusteeship-in-bankruptcy, if any, may be appropriate to import into the role of a claims administrator, whose function is similar, settling class members effectively being creditors of the defendant. Their role may benefit, for example, from being an officer of the court and immune to suit, as well as having standing to seek directions of their own motion.

How can barriers or disincentives to better data collection be reduced?
An informal poll of class action lawyers suggested that the primary point of interest among the class actions bar in respect of data collection is in the outcomes of the cases. To what extent were the funds distributed to the class as opposed to *cy-pres?* How many are distributed *pro rata* as opposed to in a total claim amount? Counsel on

both sides agreed the most important data point all sides are currently lacking is transparency as to take-up rates in class action settlements.

The primary disincentive to data collection is the interest of the data holder in maintaining secrecy. A poor distribution rate may jeopardize class counsel fees through no fault of counsel's own; or may reflect poorly on a claims administrator that had no hand in determining the terms of notice or distribution. A requirement to file a comprehensive final report, as described above, may have the effect of minimizing that impediment to data collection.

The uncertainty over the importance of the "first to file" requirement also motivates certain class counsel to avoid, or minimize, its reporting on the NCAD in order to reduce the collective action problem posed by posting pleadings online. If one counsel goes through the hard work of preparing a sophisticated claim, and another may challenge for carriage simply by copying that work, a perverse incentive is created to avoid voluntary compliance. That barrier to data collection may be reduced, first, by mandating the use of the NCAD; and second, by adjusting the courts' approach to carriage by reducing the relative value both of being "first to file" or "second to draft".

Conclusion

The OBA appreciates the opportunity to provide these submissions, and looks forward to any opportunity to discuss them in further detail with the LCO.

Appendix A – The LCO Consultation Questions

Chapter Two 

THE CONSULTATION QUESTIONS

What follows below is a list of the consultation questions identified by the LCO so far. A complete examination of the questions, and their relative priority, is included in Chapters Four and Five of the Consultation Paper.

Consultation Question 1:

How can delay in class actions be reduced?

- How may practices be changed to shorten delays?
- How might judges manage cases more efficiently?
- Should the statutory deadline for filing of a certification motion, or any other deadline applicable in class action practice, be changed?
- What changes in legislation could help cases proceed more efficiently?

Consultation Question 2:

Given that class actions must provide access to compensation to class members, how should distribution processes be improved?

- What are the best practices for distributing monetary awards to members?
- How can transaction or agency costs be reduced in distributions?
- Is transparency important in class actions? If so, how can reporting and monitoring be improved?
- Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?
- Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?

Consultation Question 3:

What changes, if any, should be made to the costs rule in the CPA?

- Should Ontario retain the two-way costs rule?
- Is the cost of indemnities against adverse costs a concern?
- Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
- Is third party funding a positive development in class action practice? Should it be more tightly regulated?
- Should the source and extent of funding be disclosed to courts?

Consultation Question 4:

Is the current process for settlement and fee approval appropriate?

- Is the legal test for settlement approval sufficient?
- Which factors should a court consider in awarding counsel fees?
- Should counsel fees be proportional to or dependent upon class recoveries?
- Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?
- What changes, if any, should be made to the process by which fees are awarded?
- Is there a role for an *amicus curae* at settlement and/or fee approval?

Consultation Question 5:

Is the current approach to certification under s. 5 of the CPA appropriate?

- What is the appropriate evidentiary standard at the certification motion?
- Should courts consider the merits of a proposed class action at certification?
- Should Ontario move in the direction of Québec by requiring only a limited evidentiary basis at the motion for certification?
- Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

Consultation Question 6:

Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?

Consultation Question 7:

Please describe class members' and representative plaintiffs' experience of class actions:

- How can class action processes be improved for class members and representative plaintiffs?
- Are there certain kinds of disputes or legal problems that class actions are not addressing?
- How can technology be used to keep class members better informed?
- Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?

Consultation Question 8:

In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?

- Is the 2018 CBA Protocol sufficient to address multi-jurisdictional class actions?
- Is statutory guidance desirable, or should this issue be left to the courts?
- Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

Consultation Question 9:

How should Ontario courts address the issue of carriage in class actions?

- Should a modified "first to file" rule be considered in Ontario?
- Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

Consultation Question 10:

What is the appropriate process for appealing class action certification decisions?

- Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
- Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

Consultation Question 11:

What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

Consultation Question 12:

In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

Consultation Question 13:

Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?

- What information should be collected?
- How can barriers or disincentives to better data collection be reduced?
- How can technology be used to facilitate greater data collection and reporting?